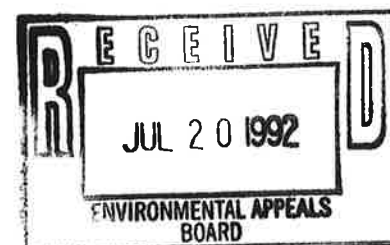


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ENVIRONMENTAL APPEALS BOARD



IN RE:

KEYSTONE COGENERATION
SYSTEMS, INC.
Subaqueous Lands Permit

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)
) March 6, 1992
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91-07

Appeal of Active Citizens and Environmentalists.

This matter was heard before the Environmental appeals board on December 3, 1991 and December 10, 1991. The following Board members were present: Thomas J. Kealy, Chairman, Richard C. Sames, Edward Cronin, Clifton H. Hubbard, Jr. and Ray K. Woodward. Ann Marie Johnson, Deputy Attorney General represented the Environmental Appeals Board. Michael J. Malkiewicz, Esquire appeared on behalf of the Appellants. W. Harding Drane, Jr., Esquire, and Harold I. Salmons, Esquire appeared on behalf of the permittee Keystone Cogeneration Systems ("Keystone"). Keith A. Trostle, Deputy Attorney General appeared on behalf of the Department of Natural Resources and Environmental Control ("DNREC").

Preliminary Matters

Appellants made an opening Motion to Remand the appeal to the Secretary for further consideration. The Motion was based upon assertions of inadequate notice of the Secretary's decision and the Board's hearing, inadequate jurisdiction of the Secretary over subaqueous land leases, and violations of due process because of Attorney

General Office representation of both the Secretary and the Board. After consideration, the Board denies the Motion to Remand on all of the grounds, for the reasons specifically described below:

1. Notice of the hearing before the Secretary

The Appellants asserted that notice of the Secretary's Order was insufficient because it failed to specifically mention the water intake structure. The Board finds this assertion to be without merit because it ignores the extensive set of notices already published on the application. Notice of the Secretary's order was published on October 2, 1991, in the News Journal. It described the project as an industrial pier that would require dredging during construction, and which would receive and unload coal for a steam and electric generating facility. The notice concluded by stating that a copy of the specific order was available through the Division of Water Resources. This was specific enough to put potential appellants on notice of the decision, while informing them of the means to obtain even more specific information should they desire it. Moreover, the Secretary's earlier notice of the hearing did identify the water intake structure and discharge pipe. The Board therefore concludes that the notice met the requirements of Title 7, secs. 6006 and 6008.

2. Notice of the Hearing before the Board.

The Appellants also alleged that the newspaper notice¹ of the hearing was defective. The Board is required to comply with the requirements of 29 Del. C. ch. 101, the Administrative Procedures Act, ("APA"), for all procedural matters, including the notification of parties. See 7 Del. C. secs. 7210, 6008, and 6009. Hearings before the Board are not open to public testimony as is required before the Secretary, although the public may attend. Notice must be given to all parties at least 20 days prior to the hearing, and must be published in two newspapers of general circulation. 29 Del. C. sec. 10124.

Notice was given to the parties well in advance of the 20 days required, and was published in the Delaware State News and The News Journal, on November 4, 1991, which advertised the original date of the hearing, November 26, 1991. At the request of the Appellants, the date was rescheduled for December 3, 1991, and a second set of notices were published in each Newspaper. The News

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The Appellants did not assert that they were prejudiced by the allegedly faulty newspaper notice, nor do they claim that they did not have more than 20 days actual notice of the hearing. There were pre-hearing conferences conducted well before the hearing, and the original November date of the hearing was moved forward to December in order to accommodate the request of one of the Appellants.

Journal inadvertently dropped one line of the notice. (The notice should have read "The hearing was originally scheduled for November, 26, 1991. It has been rescheduled for December 3, 1991..." but the underlined portions were dropped.) The Board's Administrative Assistant, upon discovering the error, immediately reported it to the News Journal, and it was corrected and re-published on November 14, 1991.

In view of the fact that there was notice in fact to each party well prior to the 20 day requirement, that no party has alleged that they were prejudiced by the timing of the notices, that the Board published a series of notices as early as November 4, which described the matters pending before it, and that any errors were caused by the New Journal, and were beyond the control of the Board, the Board finds that it has met its notice requirement under the APA. See Slawick v. State, Del. Supr., 480 A.2d 636, 645 (1984).

3. Representation by the Attorney General's Office

The Appellants also asserted that their due process rights were violated by virtue of the fact that both the Board and the Secretary were represented by Deputy Attorneys General. The Appellants do not assert that there was any collusion or unauthorized communication between the two deputies.

Absent such an assertion the Board finds that the Appellants have failed to sustain their burden of showing that such improper communications or collusion exists. See Withrow v. Larkin, 421 U.S. 35 (1975); Blinder Robinson & Co. v. Bruton, Del. Supr., 552 A.2d 466 (1989). In Blinder, the Delaware Supreme Court determined that the "mere prosecution of a case by one deputy attorney general, acting in an adjudicative capacity, is not sufficient to overcome the strong presumption of...[integrity]...set forth in Withrow in the absence of specific evidence of bias." Id. at 473.

4. Jurisdiction over Subaqueous Land Leases

The Appellant's final argument was that the Lease itself was invalid because it had not been approved and signed by the Governor. The basis of this assertion is sec. 7203 of Title 7, which, prior to July 1, 1991, required approval of both the Secretary and the Governor for all commercial subaqueous land leases. The Appellants reason that as Keystone's application was submitted prior to July 1, 1991, then it should be governed by the prior version of sec. 7203.

On July 1, 1991, the Governor signed H.B. 243, which gave the Secretary exclusive jurisdiction over subaqueous land leases. (Sec. 7206 states that "...[a]ll jurisdiction and authority to convey a fee simple or

lesser interest or to grant easements over subaqueous lands as to which grants have been made or may be made is vested in the Secretary."') The Lease, which conveyed the property interest in question was not executed until well after July 1. By that time, the Secretary had exclusive jurisdiction under sec. 7206, and no additional signatures were required.

This is not inconsistent with the Secretary's decision to apply regulations and a fee schedule in effect prior to July 1. (A new fee schedule was adopted in July by the General Assembly, and new regulations were promulgated by the Secretary.) As Keystone's application predated both the amended fee schedule and the new regulations, the Secretary properly did not apply the new standards and fees retroactively. Moreover, both the regulations and the new fee schedule specifically stated that they would not apply to any pending applications, in order to avoid retroactivity problems. No such specific exemption existed in H.B. 243, in which gave the Secretary exclusive jurisdiction.

Summary of the Evidence

Pursuant to Title 7, sec. 6008(b), the entire record before the Secretary in this matter is before the Board. The major concerns of the Appellants were: (1) the effect of pier and dredging on fish populations in the area; (2)

the possibility that dredging might result in the release of harmful contaminants into the water; (3) the potential hazards created to recreational fishing and boating; (4) the increased pollution created and (5) the cumulative impact on the area of this plant when coupled with others. The Appellants also questioned Keystone's decision to utilize coal over natural gas, and barge versus rail delivery of coal.

The Appellants first called William Moyer, Environmental Program Manager, DNREC. Mr. Moyer testified that he made recommendations to the Hearing Officer and the Secretary on the specific subaqueous lands lease, and that his recommendations were accepted by the Secretary. Mr. Moyer was familiar with a memo by Craig Shirey, a DNREC employee, which raised concerns about the impact of the project upon the striped bass population in the area. (The memo was placed into evidence with the Appellant's submission to the Board). Specifically, the memo asserted that the location of the pier is within the primary spawning area of striped bass. Mr. Moyer admitted that the water intake would have some impact on the fish population but that the design was considered the best available and would minimize the impact. When asked if he thought that the number of fish larvae or fish species killed would be significant compared to other intake

facilities in the area, Mr. Moyer responded that the department didn't compare the intake in this case with others, but that the application stood on its own.

Mr. Moyer testified that two separate fees would be charged to Keystone under the subaqueous lands permit. A dredging fee of \$40,000 was a one-time fee for removing material from the river bottom. Additionally, an annual payment of \$35,000 per year for ten years is paid under the Lease. The fee was determined based upon the fee schedule in effect at the time of the application.

Mr. Moyer believed that coal delivery by rail was rejected by Keystone in favor of water delivery because the restrictions and limitations of rail delivery were too great to overcome. Specifically, he believed economics, existing traffic and noise and congestion were the considerations taken into account. Studies were conducted on this issue but he was not sure whether DNREC had received them and he also did not recall whether the issue of type of delivery was specifically before the Secretary.

The revised subaqueous land regulations were not applied to Keystone's application because they postdated application submission. Mr. Moyer did not believe that the Secretary made any comparisons between this application with the Norfolk Southern Coal delivery application.

Finally, he was not aware of a requirement that subaqueous land lease grants comply with local zoning.

On cross-examination, Mr. Moyer stated that there where studies in the record before the Secretary which referred to the impact of the pier intake system on striped bass and it was concluded that the impact would be low. The intake system is designed with a wedge wire screen system which is "state of the art" technology. The studies submitted by Keystone indicated that the use of such a screen would reduce the impact of the water intake system upon the fish population. Mr. Moyer testified that the reports had been prepared according to federal protocols and that in his opinion they indicated that the design was sufficient to protect the environment.

Finally, Mr. Moyer pointed out that paragraph 34 of the Secretary's order incorporated measures that require Keystone to evaluate the impact on fish and fish larvae for one year. The Order limits all dredging to non-spawning season months, and Keystone must comply with water quality standards. Any improper discharge must be reported immediately. Finally, Keystone is required to create a new wetlands and replace wetland plant vegetation on the site in an area equal to the wetlands area which was destroyed due to development. If the Keystone fish study indicates significant damage to fish populations, remedial

measures (including re-stocking fish and replacing plant life destroyed) would be ordered. The Order is not specific on the means of accomplishing this, however.

Roy Miller, Fishery Section Program Manager testified that he reviewed the Keystone Application as well. He explained that striped bass is a highly regulated but not an endangered species because of serious depletion.

Mr. Miller agreed with Mr. Shirey's findings. He felt that consistent with the State's prohibition on the harvest of striped bass, that it would be inappropriate to have a major intake located at a large spawning ground. He felt that the intake at this site was not major and not equivalent to the Edgemore Power Plant nor to the Salem Nuclear Plant. He estimated water intake at Edgemore to be 50-100 times greater than proposed at Keystone and the intake at Salem to be much more than at Edgemore. In his letter to Dennis Brown dated July 2, 1991 (App. Exh. No. 1), Mr. Miller states that he disagrees in part with the findings of Bio-System's Ickteoplankton report (Keystone/DNREC Submission No. 10) submitted by Keystone. That report found that the proposed location of the project was not an important site for juvenile striped bass larvae. He pointed out that according to the Weisberg Report, it was a very important and primary area for striped bass production.

He also disagreed with the Report's finding that bass spawn up stream in deep water. He said he had seen no studies per se that striped bass avoid shallow water. He stated that the area from the Commodore Barry Bridge to Christiana Creek was a major spawning area but that the amount of spawning at any given spot might vary. Moreover, he disagreed that exposure to spawning would be no more than a day. He said the length of exposure would depend more upon spawning habits. He stated that the screen to be used had a one millimeter opening and that some striped bass larvae would be at risk with that opening. With regard to mitigating factors, he stated that some attempts to set up a hatchery had been used on the Hudson River but that there had been mixed reports on the success.

He did agree however that there was no direct discharge of heated water into the river and that the wedge wire screen technology is the best technology available to mitigate intake damage. When pressed, he could not dispute the numbers reported by Keystone as to fish population to be killed and could not determine if that was significant. He did state however that he would have been more comfortable with more discussion on the issue of impact on fish spawning.

Finally, he stated that the pier would create recreational concerns as boaters would have to go around it because of its great length. He also stated that the one millimeter screen on the wedge wire was as small as practicable.

On cross-examination by Keystone, Mr. Miller reiterated that his recommendations had been incorporated into the Secretary's order.

Next, Craig Shirey, a fisheries biologist of the State of Delaware, testified. Mr. Miller is his supervisor. In testifying about his memo of March 20, 1991, he stated that he was asked to review the plan because of his prior experience with striped bass. He testified that as far as he could tell the pier would have a significant impact on striped bass population.

He explained that his major concern was that he did not think the consultants had measured the flow rate at the right point on the River. Wedge wire screen systems are effective only if they take into account proper flow rates. Keystone's studies had referenced the flow rate in the navigational channel rather than near the point of intake. He stated that you needed to take into account the actual flow rate at the site of intake. Additionally, dredging has an impact on flow rate because the depth of the river is affected. Other than the coastal zone

application, he was not given any other report to review. He concluded by saying that he had wished that he had more time to comment and review the plan originally.

On cross-examination Mr. Shirey admitted that the wedge wire screen system was the best technology that he knew about to lessen the impact of intake on fish populations, although he had not worked in the subject area for about ten years and new technology may have been developed of which he is unaware.

Mr. Auktowicz testified on behalf of the Appellant, Save Our Lands and Active Citizens and Environmentalists. Mr. Auktowicz first disputed Keystones findings about minimal impact on striped bass by referring to several reports and fish studies. Specifically, he referred to a report prepared for the Delaware Wildlife Cooperative by Steven Weisberg dated January 1989, which he said indicated that the area in question contained a large striped bass population. He also referred to a second study by Steven Weisberg in January, 1991 which reiterates that a large bass population exists in the area of the proposed pier.

He testified that there were several factors which would have impact upon the fish by development in this area. For one, he noted that lowering pH and temperature in the water had a profound effect on fish. He referred

to the January, 1990 Weisberg study on the Presidente Rivera oil spill for support for this position. He questioned whether these three very important studies were used by Keystones consultants. Moreover, it was his belief that acid rain caused by power plant effluent lowers the pH level of the water and therefore kills fish. In referring to a study by Jonathan Sharp of the College of Marine Studies at the University of Delaware, at page 56 and 60 of the appellants submission, he noted that the water in this area was already naturally low in pH and that storms would further contribute to this low level of pH. He was also concerned about the leachate from coal that might occur should there be an accident.

In his view, the Secretary's order had also failed to take into account the possible effect of a marine accident. He believed that there was a high probability of erroneous marine movement resulting in collisions in the area. He asserted that nine pipeline crossings were located near the site and that this fact alone would increase the probability of a boating accident. Finally, he noted that the additional turbulence caused by the moving of coal barges would have a negative impact on the fish as well.

He further believed that Keystone's rationale for choosing water delivery over rail delivery was imaginary

and that rail delivery was preferable. Moreover, he stated that there had been no hearing on the public necessity for this site and therefore the lease had been inappropriately granted as a result.

On cross-examination he admitted that he was unfamiliar with the specific corporate structure of Keystone Cogeneration. He did not have any specific knowledge of whether or not the Public Utilities Commission had approved the Keystone contract, but insisted that no hearing on the issue of public necessity had been held. He admitted that the 1989 Weisberg study had been referenced in the appendix of Keystone's report. When asked if he believed that Keystone had complied with the Weisberg study recommendations on the Presidente Rivera spill, he replied that even if it had, dredging and delivery of coal would also disturb the river bottom sediment which had been contaminated by the spill.

Peter Meyer testified that he believed other permits still had yet to be resolved including the Coastal Zone Permit appeal and New Jersey appeals handled by the EPA.

On the second day of the hearing, Keystone presented its first witness, Richard Ciliberti. Mr. Ciliberti is the Vice-President of Keystone Cogeneration Systems. He is responsible for the day-to-day management of project development. He stated that the project had been under

development for approximately six years, and that all necessary approvals had been received. The project originated from an agreement for power sales with Atlantic Electric. It had been considered by the New Jersey Board of Public Utilities (Exhibit D, Keystones Brief) and the order of approval had been obtained on December 28, 1988.

In making the decision to utilize barge over rail delivery, Keystone had compared the environmental impacts of each of these options and had concluded that barge had less impact on wetlands in the area. He disputed Mr. Auktowicz's earlier assertions that there were only one acre of wetlands. Rather, he testified that there were twenty and a half acres of wetlands on the site. While there is a railway "spur" on the site, it had been constructed to serve Monsanto's (the prior owner of the site) needs. Because of public objections in New Jersey to noise and other environmental impacts, Keystone had to change its earlier plan to use rail delivery to a barge system. This change involved an increase in cost of sixteen million dollars. He pointed out that rail delivery, if used, would not eliminate the need for water intake by the plant.

As to corporate structure, he testified that Keystone Shipping owns Keystone Cogeneration, Inc. He stated that Keystone Shipping does not own or operate barges nor does

it deliver fuel. He stated that Keystone shipping is not in the coal business, does not own coal mines and is not in coal shipping.

On cross-examination he testified that he had been employed by Keystone for twenty-one years, was an engineer by training, had attended the United States Naval Academy. He stated that he was responsible for coordinating experts on the project but did not have a degree in environmental engineering. His only wetlands experience was with this project. He was however familiar with wetlands laws in New Jersey, Delaware and for the Army Corp of Engineering. He stated he was not an expert in navigation but did have some knowledge in navigation. He stated that the preliminary design on the site was developed by Bechtel Power Corporation, one of the Cogeneration partners. Keystone is not a publicly held company and is primarily owned by the Kurtz family. Some of the experts who did the work for Keystone on this project, namely S.T. Hudson Engineer, had had a prior business relationship with Keystone and had developed the information for Delaware permits.

On the use of rail, Mr. Ciliberti testified that while rail had been considered early on, no permit applications had been submitted to any state or federal officials. As far as he knew, neither New Jersey nor the EPA prohibited rail use because of air. The issue of

hazardous and/or toxic waste was not discussed by any licensing authority.

When asked if he were familiar with other Cogeneration projects in the area, he stated that he was familiar with Chambers Works, DuPont, Logan Township, and Frederick Town, which is a natural gas fueled cogeneration plant, and he believed that the Chambers Works facility was served by rail. He stated that early in the project, Keystone had attempted to reconfigure the rail lines to enable rail delivery, but they did not have a large enough turn radius on the site to make these plans workable. Additionally, Logan Township objected to the potential increase in rail traffic, and a change to barge delivery was therefore necessary in order to get the site approval. Finally, barge delivery is more efficient. Train delivery would require about 85 to 100 cars and each car would carry 90 to 100 tons of coal, while barges can carry up to ten thousand tons per delivery.

Finally, he testified that he did not believe that Keystone intended to buy any barges and that there were no contracts for future delivery currently in effect. Keystone Cogeneration did provide for a contingency plan in the event of a spill as required the the Secretary's order.

With regard to discharge, he stated there would be no process discharge into the water, unlike Monsanto who did

discharge steam already on the site. He stated that the land was under an agreement of sale from Sun Company to Keystone Cogeneration and the transfer on the property would occur at final closing. The major user of the electricity from the site is Atlantic Electric.

The pier length was necessary to mitigate the impacts of dredging, and was more costly than a shorter pier. Dredging has a negative environmental impact and so therefore the longer pier would actually minimize the negative environmental impact.

In response to Board questions on the use of coal versus natural gas, Mr. Ciliberti explained the concept of "levelization." Because coal was used less frequently in that area, the price tended to be more stable and therefore more desirable. In response to Board questions as to how ashes and cinders would be disposed of, he explained that the refuse would be vacuumed into trucks and taken to licensed depositories. In his view, gas should be selectively used as an energy source; it is better for home heating. He testified that there was no requirement in the Secretary's order for insurance coverage.

Next to testify was the Environmental Director of the project, Kent Fickett, of PG&E/Bechtel. He participated with the project management team and has degrees in the environmental field. Mr. Fickett showed the Board charts

which compared the Salem, Edgemore, Deepwater and Keystone Plant water intakes. He asserted that Keystone's water intake was minor compared to other power facilities in the area. He displayed another set of charts which compared the heated water effluent of the plants to Keystone's, which had no heated effluent.

He testified that all dredging to be done for the pier will be done in January and February pursuant to the conditions in the Secretary's order and other State and Federal agencies and would take 6-8 days.

He outlined three possible means to mitigate impact of the intake system on fish. First he indicated that the location and orientation of the intake screen could be adjusted. Secondly, he pointed out that the company had operational flexibility and could schedule maintenance on the site to accommodate spawning seasons. Third, he stated that Keystone was willing to restock fish destroyed by the operation. Restocking, in his opinion had been successfully used throughout the United States.

He testified that the Army Corp of Engineers had approved the use of wedge wire screens with certain conditions with which Keystone was in compliance. He pointed out the the EPA also had no objection to their proposed plans.

On cross-examination he admitted that he was not aware if DNREC had approved a specific dredging plan to date. He stated that he did have prior experience with fish impact monitoring called for by the Secretary's order. His experience in the past with restocking fish came from his participation on a Citizen's Advisory Task Force in California. In response to Mr. Miller's testimony that restocking had had mixed success in the past, he replied that he believed that the success of restocking depended upon location and the genetic strains of fish used. Keystone would put all its efforts into determining the proper means to restock, if necessary. Keystone had not specifically studied the effectiveness of restocking programs.

Dredging of the site would entail the removal of 40,000 cubic yards of material, for which all approvals had been received. In his view, the turbidity created would have minimal impact turbidity is naturally higher in Winter months. Maintenance dredging will be conducted once in ten to fifteen years. This estimate was based upon the the experience of Monsanto for the area.

On rebuttal Mr. Auktowicz disputed Keystone's contention that coal was preferable to gas because of the "fuel mix" utilized by the east coast. According to a Value Line, Summer, 1991 report, gas represented only seven

percent of Atlantic Electric's fuel sources. He believed, based upon information from a Mr. Ambrosia of New Jersey, that the fourteen casinos in Atlantic City had created the additional energy needs and that the pier was being built to serve that additional need. He re-asserted that no public hearing on any necessity issues had been held in New Jersey. He submitted a map that indicated the source of other power plants in the areas and noted the increasing number of power plants in this area.

Findings of Fact and Conclusions of Law

The Secretary has jurisdiction over commercial projects on subaqueous lands. 7 Del. C. sec. 7203.² In issuing subaqueous land leases, the Secretary is required to issue those leases that are in the best interests of the citizens of Delaware. Specifically, the purpose of chapter 72 is to:

...empower the Secretary to deal with or dispose of interests in public subaqueous lands and to place reasonable limits on the use and development of private subaqueous lands, in order to protect the public interest by employing orderly procedures for granting interests in public subaqueous land and for issuing

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Although Appellant contested this jurisdiction alleging that the Secretary had joint jurisdiction with the Governor under the new provisions of section 7203, the Board found that the provisions of H.B. 243, signed July 1, 1991, applied here. (See page 5.)

permits for uses of or changes in
private subaqueous land.

7 Del. C. 7201. Additionally, a permit is required for any dredging which might occur in the construction of the dock as exists in this case. 7 Del. C. sec. 7205.

Pursuant to the Board's newly revised statute, an appeal to the Board shall include as part of the record, the entire record before the Secretary. 7 Del. C. sec. 6008(b). Additionally, the burden of proof is on the Appellant to show that the "Secretary's decision is not supported by the evidence on the record before the Board. The Board may affirm, reverse or remand with instructions any appeal of the case decision of the Secretary." Id. For the reasons stated below, the Board finds that the Appellants failed to sustain their burden of proving that the Secretary's decision was not supported by the evidence in the record.

1. Impact of the project upon fish populations.

The most persuasive arguments made with regard to the lease center upon the impact of the plant upon fish populations. The Appellants placed particular emphasis upon the impact of the intake system on striped bass larvae. In testimony and in their brief, the Appellants refer to several studies which indicate a high percentage of fish larvae spawning areas in the location of the

proposed dock. Appellants raised concerns that Keystone had not taken account of the actual location of these spawning areas adequately and had miscalculated flow rates of the river.

Although there was minimal testimony regarding emissions, the Appellants also asserted that the presence of the coal plant would cause the pH in the surrounding water to be lowered which would have the result of killing more fish. Additionally, they assert that the plan would create an increase in acid rain that would result in the lowering of pH levels of the water and also contribute to the killing of fish. Finally, they believe the leachate from coal which might spill as a result of an accident would also have harmful effects on the fish.

In response, Keystone contends that the fish studies submitted into evidence support their position that striped bass eggs and larvae will not be significantly impacted by the intake screen existing on the plant. They argue that flow velocities, the dispersion of eggs, and the use of the "best available technology" wedge wire screens will minimize impacts. The reports also indicate that the use of NOX Control Systems together with the planned use of low sulphur coal will minimize acid related emissions and will not have a deleterious impact on the fish in the area.

The Board agrees with the Secretary's finding that the evidence regarding the impact of the water intake upon fish larvae is in conflict and unsettled. The Board finds that in view of the fact that the NPDES discharge for process and cooling water has been eliminated by Keystone, and that storm water will be collected and used within the plant without being discharged, that the Appellant's concerns about the increased pH levels and acid rain are not supported by the evidence. The Board agrees with the Secretary's finding that the record suggests that only very small quantities of coal may be spilled into the river as a result of transfer operations on the pier. Other evidence relating to the location of spawning areas, and flow rates of the river as they relate to the location and orientation of the wedge wire screen intake system (particularly as presented by Mr. Shirey) is less conclusive and supports the need for further follow-up and study. Thus, the evidence submitted by Keystone is sufficient to support the decision of the Secretary to issue the permit and lease contingent upon a requirement that Keystone further study and document the impacts upon the fish populations, and provide remedial measures if necessary.

The permit and lease require Keystone to conduct a one year study on the impact of fish larvae at the site

and requires Keystone to undertake remedial efforts made necessary by virtue of the findings of that report. Remedial efforts might include adjusting the orientation of the wedge wire screen and restocking the river with striped bass. Moreover, the lease limits the seasons when dredging may occur to those time frames during which spawning of fish is not occurring, and requires compliance with water quality standards. The Board finds that these are adequate protections in view of the uncertainty about the impact on fish populations.³

2. Impact of Dredged bottom sediment on water quality.

The Appellants have raised concerns about the dredged river bottom materials, which could be contaminated, creating additional pollution in the river. They submit no additional evidence on this point, however. The evidence in the record before the Secretary indicated that samples of bottom material to be dredged were analyzed using EPA methodology and found to be uncontaminated. In the absence of any competent evidence to rebut this finding, the Board concludes that the Appellants have

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The Board hopes that the results of these studies, and any recommendations regarding mitigation will be released to the public.

failed to sustain their burden of showing that this finding of the Secretary is not supported by the evidence.

3. Impact upon recreational and commercial boat traffic.

Similarly, although the Appellants assert that the existence of the pier will have a hazardous and detrimental effect upon recreational boating and other boat traffic in the area by creating congested traffic, they have submitted no evidence, other than these assertions, that detrimental congestion would indeed exist. They contend that the Secretary did not take these factors into account. The evidence in the record indicates that the United States Army Corp. of Engineers has approved the project and that it received favorable recommendations from the Mariner's Advisory Committee. In view of these favorable approvals, which consider the effect upon Marine traffic, and in the absence of countervailing competent evidence, the Board finds these concerns to be unsupported.

4. Cumulative Effects

The Appellants claim the Secretary improperly failed to consider the cumulative effects of all of the power plants in the region upon the State of Delaware when considering this application. While it is true that the Secretary's Order does not specifically address cumulative

impacts, such impacts have been considered by implication by virtue of the complicated regulatory process imposed upon Keystone.

Evidence submitted by Keystone supported their position that the incremental additional impact of this plant as compared to others in the area is small. Absent any more specific evidence to the contrary submitted by the Appellants, the Board is unable to conclude that the evidence does not support the Secretary's decision.

4. Barge Delivery versus Rail Delivery

The Board finds that there is sufficient evidence in the record before it to support Keystone's decision to utilize barge delivery of coal over rail delivery. The Appellants do not dispute Keystone's testimony that rail lines, while available, met with considerable negative reaction from the local community in which the facility is located. Additionally, evidence submitted by Keystone which indicated that the comparative impact of rail verses barge indicated that barge would have minimal additional impact, coupled with Keystone's apparent inability to utilize rail despite the lowered cost and because of local opposition, is credible and sufficient evidence to support the Secretary's decision to issue a subaqueous land lease.

5. Coal versus Gas

Finally, and despite the testimony by Keystone, the Board is not entirely clear as to why natural gas was rejected as an energy source for this facility. It is the Board's opinion however, that this is in the bailiwick of the New Jersey Board of Public Utilities, and therefore a matter over which they do not have jurisdiction.

For the foregoing reasons the Board affirms the decision of the Secretary by a vote of 4 to 1 (Woodward - nay).

Thomas J. Kealy 5 Mar 92

Thomas J. Kealy
Richard Sames

Richard Sames
Edward W. Cronin

Edward W. Cronin
Clifton H. Hubbard, Jr.

Clifton H. Hubbard, Jr.
Ray K. Woodward

Ray K. Woodward

